IN THE SUPREME COURT

OF THE UNITED STATES

Supreme Court, U.S.
FILED
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No. 71-211

DON RHOADES CORPORATION, a corporation, Petitioner,

vs.

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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DON RHOADES CORPORATION,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF NEW MEXICO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico, entered in the above entitled cause on May 10, 1971.

CITATIONS TO OPINIONS BELOW

The District Court of Bernalillo County rendered judgment dismissing the Motion for summary judgment as to Plaintiff-Respondent American Institute of Marketing Systems, Inc., and thereafter upon a trial on the merits denied Plaintiff-Respondent's judgment on a Missouri judgment obtained in St. Louis County, Missouri Magistrate Court wherein Petitioner Don Rhoades Corporation was defended, and whose defense was fraud in the inception of the American Institute of Marketing Systems, Inc. form contract, signed by Don Rhoades Corporation by its President, Don Rhoades, in New Mexico. Full faith and credit was denied the Missouri judgment. The District Court of Bernalillo County, New Mexico, Edwin L. Swope, Judge, granted judgment to the Defendant-Petitioner on the basis that the Missouri judgment was obtained based on a contract conceived in fraud secured by a cognovit note, illegal by

statue in the State of New Mexico, and the alteration of the contract in Paragraph 5, where the term thirty six (36) months was stricken and six (6) months placed therein, after approval by long distance call from New Mexico to Missouri by the President of American Institute of Marketing Systems, Inc. (Aims), vitiated the statement in the contract that same would be governed by Missouri law; vitiated the particular extension clause of the contract and made the same a New Mexico contract, as the last act was performed in New Mexico by Don Rhoades and initialled by Don Rhoades, and agreed to by Aims in New Mexico and accepted by Aims in New Mexico, as the telephone call from Aims' agent with Don Rhoades in Albuquerque, New Mexico, contacting the President of Aims, and the President speaking directly to Don Rhoades after the contract was changed from 36 months to 6 months, constituted a rejection of Aims' offer and acceptance thereof in New Mexico by Aism.

The Orders and Judgment are printed in Appendix "B", infra, P. _____. The Opinion of the New Mexico Supreme Court printed in Appendix "B", infra, P. ____, reported in the New Mexico Advance Sheets Vol. 10, No. 2, dated May 13, 1971.

JURISDICTION

The Order denying a rehearing on the Opinion of the Supreme Court of the State of New Mexico was entered on June 16, 1971, (Appendix "B", infra, P. ____). The jurisdiction of this Court is invoked under U.S.Sup. Ct.Rule 19-1(a), 28 U.S.C.A.

QUESTION PRESENTED

The Constitution of the United States provides in part, Article 4, Section 1:

> "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State..."

(Citations omitted.)

The question presented is whether the Court of a sister state is required to give full faith and credit to the judgment of the

sister state under the above cited Section of the Constitution of the United States blindly and without any defense being allowed the judgment debtor of the state where full faith and credit is sought to be invoked by the judgment entered in the sister state.

UNITED STATES CONSTITUTION PROVISIONS, STATE STATUTES AND STATE LAWS INVOLVED

The Constitution provisions involved are Article 4, Section 1 of the United States Constitution as set forth in the Supreme Court Opinion of the State of New Mexico, supra, and the United States Constitution, 14th Amendment, Section 1, which provides in part:

> "... nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Mexico Statutory Provision: 21-9-18 N.M.S.A. (1953) - "Cognovit note" defined-Execution and procurement prohibited-Penalty for violation.

STATEMENT OF THE CASE

By letter addressed to the Defendant-Petitioner Don Rhoades Corporation, Plaintiff-Respondent American Institute of Marketing Systems, Inc. requested an interview for their area agent, Mr. Glenn O'Neal, to call on Defendant-Petitioner for the purpose of discussing Defendant-Petitioner entering into a contract with Plaintiff-Respondent referred to as "Residential Real Estate Referral Program fir AIMS members' Brokers". Plaintiff-Respondent's agent, Mr. O'Neal, met with Defendant-Petitioner's President, Don Rhoades, in the office of Don Rhoades Corporation. 251 Wyoming, N.E., Albuquerque, New Mexico, and proceeded to explain to Mr. Rhoades AIMS program, plain records, quoting brochures, and other sales paraphernalia. It should be noted that in the initial contact Aims was insistant on knowing whether or not he would able to make a decision immediately at the end of the interview presentation. Mr. Rhoades agreed that he could. After two-thirds of

the time of the interview had been taken up by Mr. O'Neal, the contracts and documents were brought forth for the first time and shown to Mr. Rhoades. It is a highly technical contract and included other instruments, the only one of importance in this Petition being a cognovit note signed by Mr. Rhoades on behalf of the corporation. The contract provided in paragraph 5(g) that the contract would be for 36 months and was automoatically renewable at the end of that term unless Plaintiff-Respondent had received from Defendant-Petitioner in writing a letter thirty (30) days prior to the expiration of the term stating that the Defendant-Respondent corporation did not intend to renew; otherwise the contract was automatically renewed. Mr. Rhoades objected to the 36 month provision and stated he would try the program for six months and then decide whether he wanted to continue. Mr. O'Neal, Aims agent, said he had no

authority to alter any provision of the contract, and upon Mr. Rhoades insistence that he would only sign for six months, Mr. O'Neal placed a long distance call to the President of Aims corporation in St. Louis, Missouri. Mr. O'Neal advised the President of the corporation of Mr. Rhoades position; the President discussed with Mr. Rhoades the alteration of the provision and agreed that thirty-six months could be stricken and six months inserted therein. This was done by pen and ink and initialled by Mr. Rhoades. Immediately above paragraph 5(g), paragraph 5(f) provided as follows:

> "Aims and Broker mutually agree that George M. Kinder, located at Rt. 3, Box 25, U.S. Highway 40, Chesterfield, St. Louis County, Missouri, shall serve Aims as its nominee for the receipt of material under paragraph 5, subparagraph a above, and shall serve Broker as Broker's agent for the receipt of any legal documents, including process as may be required under this Agreement, or the enforcement thereof."

Mr. Rhoades asked Mr. O'Neal, "who is George M. Kinder"; reason being that he read this paragraph immediately as he was discussing the six months clause. Mr. O'Neal's answer was "refer to paragraph 5(a) above". Paragraph 5(a) states:

> "During the term of this Agreement, Broker will keep all information concerning Aims training methods confidential, and in the event of termination, Broker will return to Aims all training materials, including Manuals and such other materials as are marked 'confidential'. Aims will appoint a nominee to receive such materials."

Mr. O'Neal gave no further identification of Mr. Kinder. Prior to the end of the six months term, Mr. O'Neal had occasion to be in the office of the Defendant-Petitioner of the President Don Rhoades, and Defendant-Petitioner advised Mr. O'Neal that he was not pleased with the program or the way it was handled and was sending a check for the remainder of the six month term which he had contracted for and all the materials which he had that had been sent to him by Aims to George M. Kinder. This visit occurred more than thirty

(30) days prior to the end of the six month period. Mr. O'Neal admitted under oath that he did not tell Mr. Rhoades if those were his feelings to send a written notice of termination along with the materials; he merely said "refer to your contract", nothing more. Mr. Rhoades did, in fact, pay for the first six months period in full and did return to Mr. Kinder all materials that had been sent to him by Aims shortly after Mr. O'Neal's visit. Subsequent, Mr. Rhoades received the letter from Aims demanding payment for the automatic renewal six months period, and Mr. Rhoades consulted his attorney at this point for the first time. The only document pertinent to this writ that was in Mr. Rhoades' possession was a photo copy of the contract, and no other instrument that he had signed, or a copy thereof. Upon advice of counsel, Mr. Rhoades ignored the letter from Aims. His attorney wrote advising he did not intend to pay, as he did not owe any-

thing; the contract having been terminated after full payment. The Missouri law suit resulted. Summons and Complaint were served upon George M. Kinder in Missouri for payment of the automatic renewal clause provision. The Summons and Complaint were mailed by Mr. Kinder to Don Rhoades Corporation upon service. They were received in the due course of mail by Don Rhoades Corporation, then no entry or answer being filed in Missouri by Defendant-Petitioner, the default judgment was taken in Missouri, sent to New Mexico, where a Complaint for judgment on the Missouri judgment was filed by Aims in the District Court, Division III, Honorable Edwin L. Swope, Judge, and judgment was prayed under the full faith and credit clause of the Constitution of the United States. Defendant-Petitioner answered, set up the defense of fraud in the inception of the contract, fraud in the conceiving of this contract, fraud in the fact that the contract was not for the purpose of

a real estate relationship between Aims and member brokers, but a contract whereby Aims could sue member brokers out of their home state for amounts that could not be defended against without excessive costs in St. Louis County, Missouri. Summary judgment was denied, and the case was heard on its merits by the Honorable Edwin L. Swope on the 13th day of January, 1970, and a judgment entered for Defendant-Petitioner on June 8, 1970 denying Plaintiff-Respondent's judgment full faith and credit and dismissing Plaintiff-Respondent's case with prejudice. From this judgment Plaintiff-Respondent appealed to the Supreme Court of the State of New Mexico. Briefs and oral arguments were heard before the Supreme Court; Defendant-Petitioners position being that no contract conceived in fraud was entitled to full faith and credit in New Mexico, and by statute in New Mexico a cognovit note is void.

Fraud was argued in detail, both in the briefs and the oral argument before the Supreme Court of New Mexico, and in a companion case filed in the District Court of Bernalillo County, the Attorney General of the State of New Mexico sued Aims for unlawful practice in the State and requested the Court to void Aims' real estate broker agent's license. Prior to hearing this suit, Aims' Broker Agent voluntarily returned his license to the State Realtors Licensing Board for revocation. That case thereupon became moot, as Aims was no longer in the State.

REASONS FOR GRANTING WRIT

The reasons for granting this writ is that the questions presented here are of grave concern to the public in general and to the residents of the State of New Mexico, and all of them in particular, and were the opinion of the Supreme Court of the State of New Mexico and this case followed by other states, then it would become a matter of

grave concern in each and every one of those states. Therefore, it becomes a matter of grave public concern of the Supreme Court of the United States to examine the opinion of the State of New Mexico carefully and to deny that the full faith and credit clause shall be followed blindly without exception from state to state, because to do so would automatically deprive the citizens of the State of New Mexico the right of due process of law on a sister state judgment. Although reciprocity and full faith and credit are of vast importance to the citizens of the United States, but of greater and graver importance is that each and every citizen is entitled to due process of law. It is well established where judgment is sought to be perfected in a state other than that in which it was issued, that the burden is upon he who takes the judgment and attempts the perfection thereof in a sister state. In the

instant case the Honorable Judge Edwin L. Swope denied summary judgment because absolute facts tained the contract and all other instruments executed by Defendant-Petitioner with fraud. The entire contract and the cognovit note accompanying same, the automatic extension clause, the refusal of agent-manager to answer direct questions with direct answers, i.e., who is George M. Kinder; answer: refer to paragraph 5(a) above. Witness O'Neal was taught the art of evasion, silence and misleading his victim to the signature line. Although the trier of the facts in the instant case, Judge Swope, found fraud in the inception of this contract, making the appointment of George M. Kinder an agent for the service of process in Missouri for a New Mexico corporation, void, he even found fraud in the conception of this contract. In the territorial days in New Mexico where every county extended to vast proportions, when Lew Wallace, author of Ben Hur, was governor, the City of Las Vegas

in Lincoln County, wherein roamed Billy the Kid, Ben Kilpatrick and Black Jack Ketchum were posted and warned, along with all other bunko artists, confidence men and swindlers to stay clear of the City of Las Vegas or they would be the guest of honor at a neck tie party to be held in their behalf, this warning stopped fraud from being perpretrated upon its citizens. One hundred years later the Supreme Court of the State of New Mexico, in its Opinion stating that full faith and credit must be given judgment of a sister state and setting aside all other considerations, has vitiated this warning, has deprived the citizens of the State of New Mexico of due process and has left them helpless and at the mercy of every fraud on which a judgment can be obtained in a state other than New Mexico. The Supreme Court of the United States, as guardian of all citizens, must not allow this foothold in one state, and then, like a cancer, spread to others.

CONCLUSION

For the foregoing reasons, and to restore due process to New Mexico, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Stuart Hines
Counsel for Petitioner
2929 Monte Vista, N.E.
Albuquerque, New Mexico

Dated this 6th day
of August, 1971.

APPENDIX "A"
CONSTITUTIONAL PROVISIONS

U.S. Sup.Ct. RULE, 19-1(a), 28 U.S.C.A.

Constitution of the United States, Art. 4, Section 1: in this Article full faith and credit shall be given in each state to the public Acts, Records and judicial procedure of every other state.... In the case at bar this was the sole consideration given by the Supreme Court to overturn the decision of the lower court and order the lower court to issue a summary judgment to the Missouri decree in New Mexico. The Supreme Court overturned the lower court's decision stated, although this decision shocks the conscience, the Constitution states that full faith and credit must be given a judgment of a sister state. No mention was made that summary judgment was denied by the lower court, and on a hearing of the merits, out of the mouth of the agent-manager of the Plaintiff-Respondent came the words that proved conclusive extrinsic fraud, both in the contract,in the presentation of the contract, in the conception of the contract and in getting Defendant-Petitioner's

name on the contract. The entire case in the lower court was defended on the basis of fraud, which went directly to the jurisdiction of the Missouri court to issue a judgment which would be given full faith and credit in New Mexico.

MAY V. ANDERSON (1953) 345 U.S. 528, 97 Led. 1221, 73 S.Ct. 840 - The Court states:

> "Irrespective of the conclusive effect of a judgment in the state where rendered, a judgment of a sister state in personom rendered by a court without jurisdiction on the defendant's person is not entitled to full faith and credit."

MILWAUKEE COUNTY V. M. E. WHITE CO. (1935) 296, U.S. 268, 80 Led. 220, 56 S.Ct. 229 - The court, by way of dictum, stated that, without violating the full faith and credit clause, recovery in an action upon a judgment of a sister state can be resisted only on certain grounds, saying that recovery may be denied "possibly because procured by fraud", This statement is followed by a citation of decisions of the Supreme Court containing apparently inconsistent statements. Therefore,

this question must be squarely resolved once and for all. The full faith and credit clause does not preclude defense in an action on the judgment of a sister state that the judgment was obtained by fraud, where the same defense is under the facts upon which it is predicted, is available in an action upon a domestic judgmentbrought in the state which the judgment was rendered.

LEVIN V. GLADSTEIN (1906) 142 N.C. 482, 55 S.E. 371, 32 L.R.A. N.S. 905, 115 An. St. Rep. 747 - For the same reason it is obvious that a judgment of a sister state is impeachable for fraud in an action brought thereon in another state, the defendant is not required to obtain relief for fraud in the state in which the judgment was rendered.

STATUTORY PROVISION:

21-9-18 N.M.S.A. (1953) - "Cognovit note" defined-Execution and procurement prohibited-Penalty for violation. - Any negotiable instrument, or other written contract to pay money,

which contains any provision or stipulation giving to any person any power of attorney, or authority as attorney, for the maker, or any endorser, or assignor, or other person liable thereon, and in the name of such maker, endorser, assignor, or other obligor to appear in any court, whether of record of inferior, or to waive the issuance of personal service of process in any action to enforce payment of the money, or any part claimed to be due thereon, or which contains any provision or stipulation authorizing or purporting to authorize an attorney, agent or other representative, be he designated howsoever, to confess judgment on such instrument for a sum of money when such sum is to be ascertained, or such judgment is to be rendered or entered otherwise than by action of court upon a hearing after personal service upon the debtor, whether with or without attorney's fee, or which contains any provision or stipulation authorizing

or purporting to authorize any such attorney, agent, or representative to release errors, or the right of appeal from any judgment thereon or consenting to the issuance of execution on such judgment, is hereby designated, defined and declared to be a cognovit note. Any person, natural or corporate, who directly or indirectly shall procure another, or others, to execute as maker, or to endorse, or assign such cognovit note, or whoever being the payee, endorsee, or assignee thereof shall accept and retain in his possession any such instrument, or whoever shall conspire or confederate with another, or others, for the purpose of procuring the execution, endorsement or assignment of any such instrument, or whoever shall attempt to recover upon or enforce within this state any judgment obtained in any other state or foreign country based upon any such instrument, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars ($50.),

and not exceeding five hundred dollars ($500.00), to which may be added imprisonment for not less than thirty (30) days.

Aims contract with Don Rhoades Corporation, Defendant-Petitioner, was security for a cognovit note, which note was Plaintiff-Respondent's Exhibit 2 in the case at bar; said note provides as follows:

> "Where authorized, I/we authorize any attorney at law to appear in any court of record in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me/us in favor of the holder thereof for the amount then appearing due, and thereupon to release all errors and waive all rights of appeal."
>
> s/Don E. Rhoades

This note is clearly a cognovit note and it is a crime to attempt to collect same in the State of New Mexico. It is well settled by the Supreme Court that where judgment is rendered on a note which contains a warrant which authorizes, after the ogligors default, suit is filed; some attorney usually unknown to the

obligor, enters the latters appearance as defendant and judgment is taken. Such judgment is often referred to as cognovit judgment and the instrument authorizing the entry of the judgment as a cognovit instrument. The full faith and credit clause of the Constitution specifically denies the right to perfect a judgment in a sister state based on a cognovit instrument where the cognovit instrument is valid, but when perfecting the judgment in the sister state the cognovit instrument is void and a crime to attempt its enforcement as was done by the Supreme Court of the State of New Mexico in reversing Judge Swope's decision. The Supreme Court decision swept aside the above statue, became the law-making body of the State and allowed the enforcement of a cognovit judgment where the instrument is the basis, and a crime to attempt enforcement in New Mexico.

APPENDIX "B"

OPINIONS AND JUDGMENTS OF THE COURT BELOW.

STATE OF NEW MEXICO COUNTY OF BERNALILLO	)	IN THE DISTRICT COURT
AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. a Missouri corporation, Plaintiff, VS. DON RHOADES CORPORATION a corporation, Defendant.	)	NO. A 38745

ORDER DENYING MOTION

This matter coming on to be heard on the Motion for Summary Judgment of Plaintiff, and after evidence presented and the Court being fully advised in the premises, and all parties being represented by their attorneys,

IT IS THEREFORE ORDERED that the Motion for Summary Judgment of Plaintiff is denied.

s/Edwin L. Swope
District Court Judge

Filed October 15, 1969

STATE OF NEW MEXICO	)	
	)	IN THE DISTRICT COURT
COUNTY OF BERNALILLO	)	
	)	
	)	
AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation.	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. A 38745
	)	
DON RHOADES CORPORATION, a corporation,	)	
	)	
Defendant.	)	

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I

That Plaintiff corporation is now and has been since February 3, 1967, a Missouri corporation with its principal offices in St. Louis, Missouri.

II

The Defendant corporation is now and has

been since February 3, 1967, a New Mexico corporation with its office located in Albuquerque, New Mexico, at all times material to this action.

III

That prior to February 4, 1967, Plaintiff corporations agent, Glenn O'Neal, contacted Defendant corporation through its President, Donald E. Rhoades, for the purpose of presenting a brokers' marketing system to the Defendant corporation, and Plaintiff's agent, Glenn O'Neal, and Donald E. Rhoades, President of Defendant corporation, met on the 3rd day of February, 1967, in Donald E. Rhoades's office in Albuquerque, New Mexico.

IV

That the Plaintiff's representative, on

February 3, 1967, at the appointed time met with Donald E. Rhoades, President of Defendant corporation, and Plaintiff's agent presented to the Defendant a marketing systems program which purported, among other things, to pay Defendant for the names and addresses of persons moving to Albuquerque from other locations in the United States so that defendant corporation could contact said persons for the purpose of selling them a home or homes, in Albuquerque, New Mexico.

V

That plaintiff's representative, Glenn O'Neal, and Donald Rhoades, President of defendant corporation, discussed plaintiff's program for some hour and a half prior to the examination of the instruments to be executed by defendant corporation.

VI

That plaintiff's representative, Glenn O'Neal, in calling and setting up the appointment, insisted on being assured that at the end of the presentation defendant corporation would be in a position and have sufficient evidence to immediately execute a contract with plaintiff corporation.

VII

That as a result of the representations of plaintiff's agent, defendant corporation, through its President, executed one original of a contract designated "Membership, American Institute of Marketing Systems, Inc.".

VIII

When defendant, during the short interval of time remaining in the interview, skimmed through the contract set forth in paragraph VII,

advised plaintiff's agent, Glenn O'Neal, that he would refuse to sign any contract for a longer period than six (6) months. After this being consented to, his attention was drawn to paragraph 5(f) of the contract, and defendant's President, when he asked the meaning of 5(f), was misled by plaintiff's representative, Glenn O'Neal, in that instead of answering, he referred defendant to paragraph 5(a), which paragraph states, "That in the event of termination, Broker will return to Aims all training materials, including manuals and such other materials as are marked confidential. Aims will appoint a nominee to receive such materials."

IX

Plaintiff's representative, Glenn O'Neal, had been with the plaintiff corporation for many years.

X

That although specifically asked the duties of George M. Kinder by defendant's President, and fully knowing what such duties were, Glenn O'Neal failed to respond and instead of answering the questions, pointed out paragraph 5(a) only as the duties of Mr. Kinder. Nothing in paragraph 5(a) states that defendant corporation is submitting itself to service of process through an agent in Missouri.

XI

By the actions of plaintiff's representative, defendant corporation was deliberately led to believe that the only duties of George M. Kinder was to receive materials returned from defendant to plaintiff at the termination

of the contract, and there was no statement made during the entire conversation between Glenn O'Neal and Defendant's President that paragraph 5(f) subjected defendant corporation to service of process in a legal action in the State of Missouri.

XII

That pursuant to the discussion and representations of 1½ hours conversation, Glenn O'Neal, representative of plaintiff, showed defendant through all the material of plaintiff and induced defendant's President to execute the above cited contract, together with a cognovit note and other instruments, all in the original with no copies of any type.

XIII

That defendant corporation plainly stated

to plaintiff's representative, and had marked in the contract, that they would take the service for six (6) months on a trial basis.

XIV

Two weeks prior to the termination date, as set forth in paragraph 5(g), the President of defendant talked to plaintiff's representative, Glenn O'Neal, again and advised that he did not intend to renew the contract and was mailing all the material to Mr. George M. Kinder in St. Louis, Missouri, Mr. Glenn O'Neal fully knowing that the contract was automatically renewed unless cancelled in writing and said cancellation notice sent to Aims was guilty of nonfeasons in not telling Mr. Rhoades that the simple return of the material belonging to Aims at the end of six (6) months was his only duty after termination, which termination would happen automatically

at the end of the six (6) month period.

XV

Defendant corporation paid to plaintiff corporation all monies due and owing to them for the six (6) months period set forth in Item (g) in Paragraph 5 of the contract.

XVI

Defendant clearly advised plaintiff through its representative, Glenn O'Neal, that it would not renew, and further that all materials that had been given to defendant under the contract were returned at the end of the six (6) months, evidencing no intention of being a part of the Aims marketing program any longer.

XVII

Defendant was not advised by either Glenn O'Neal or by plaintiff corporation that they

would continue to bill defendant, as they considered the contract automatically renewed.

XVIII

That the nondisclosures by plaintiff's agent and representative, Glenn O'Neal, in refusing to advise defendant corporation, when asked specifically the effect of paragraph 5(f) which made defendant susceptible to service of legal process in the State of Missouri, constituted a fraudulent nondisclosure of a material fact which was known to plaintiff and unknown to defendant, as the failure of plaintiff's representative, Glenn O'Neal, when advised two weeks before the six (6) month trial period was up by Donald E. Rhoades personally that he did not intend to continue and was mailing all the material back to Mr. Kinder, and Glenn O'Neall's

failure to state that this was not sufficient to terminate the contract as it was automatically renewed unless a written letter of termination was sent, all of which were additional material nondisclosure which constituted fraud on the defendant.

XIX

That the procedure of plaintiff in making an appointment in explaining the program of Aims and the method used by Glenn O'Neal, representative of plaintiff, was deliberately misleading and fraudulent.

XX

That defendant was given no opportunity or time to consult with his attorney, or to examine the contract at his leisure, out of the presence of the Aims representative.

XXI

That the action of Aims representative was fraudulent from the inception, and the answers to any of defendant's questions as it relates to his obligations under the contract were deliberately and willfully, and with intent to defraud defendant, misleading.

XXII

That the judgment taken in Missouri against defendant through service of process upon Mr. George M. Kinder was void and of no force and effect.

XXIII

That defendant signed an original contract and other papers relating to defendant's obligation, i.e., a cognovit note, all of such other papers being in the original only, and all of which were taken out of defendant's

possession by plaintiff's representative and no copies of any kind or of any instruments signed by the defendant were left in defendant's possession, and of all the papers signed by the defendant he only received a Xerox copy from plaintiff corporation of the contract labeled "Membership, American Institute of Marketing Systems, Inc." and no other copies of papers signed by defendant.

XXIV

That plaintiff's judgment was based on monies purportedly owed to plaintiff for a period after the six (6) months provided for under paragraph 5(g).

XXV

That the method of setting up the agreement with the defendant, the time spent with Glenn O'Neal, plaintiff's representative, and the method used and the answers given by the said Glenn O'Neal relating to the contract were

solely for the purpose of having defendant examine the documents without proper advice and examination, and for the purpose of defrauding and misleading, willfully and knowingly, defendant corporation from the inception of the contract by plaintiff corporation.

CONCLUSIONS OF LAW

I

That the action in which the purported Missouri judgment against defendant arose was based on a fraudulent document.

II

That Glenn O'Neal, representative of plaintiff, deliberately, willfully and with intent to defraud, misled defendant as to the duties of George M. Kinder, as stated in paragraph 5(f) of the contract.

III

That the defendant corporation has never done business in the State of Missouri.

IV

That service upon the defendant was made on a purported agent of defendant residing in the State of Missouri, which purported agent was, in fact, not known as such to the defendant.

V

That the defendant would not have executed the Aims marketing system contract had he known that George M. Kinder was authorized by said contract to accept service for defendant in the State of Missouri, and that a suit could be brought against defendant in Missouri, and a judgment taken in Missouri on such service.

VI

That the Missouri judgment was based on a purported contract which was void from its inception because of willful misconduct, misrepresentations and fraud on the part of plaintiff.

VII

That the judgment taken by plaintiff against defendant in Missouri, and on which judgment plaintiff sought to perfect in New Mexico, was void and not entitled to full faith and credit in that the cause of action was based upon fraud, misrepresentation and deceit.

VIII

That at no time did the Court in the State of Missouri have any jurisdiction over the defendant corporation in Case No. S-9369.

IX

That no suit brought in New Mexico on the default judgment rendered against defendant in Case No. S-9369 in Missouri is entitled to full faith and credit by the courts of the State of New Mexico.

X

This cause in the State of New Mexico in the District Court of the Second Judicial District should be dismissed with prejudice because the action of plaintiff is based solely on a void judgment.

XI

That defendant is entitled, as a matter of law, to have this action dismissed with prejudice and defendant should be granted reasonable attorney's fees in the sum of $666.00.

All Findings of Fact and Conclusions of Law, not hereinabove rendered or given are specifically denied.

s/Edwin L. Swope
District Court Judge

Filed June 8, 1970

STATE OF NEW MEXICO	)	
	)	IN THE DISTRICT COURT
COUNTY OF BERNALILLO	)	
	)	
AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. A 38745
	)	
DON RHOADES CORPORATION, a corporation,	)	
	)	
Defendant.	)	

J U D G M E N T

This cause coming on to be heard on the 13th day of January, 1970, and the plaintiff appearing through its attorneys, Sutin, Thayer and Browne, by Jonathan Sutin, and defendant appearing through its President, Donald E. Rhoades, and through its attorney, Stuart Hines, and the Court having heard evidence and examined all exhibits presented that were introduced, and being fully advised in the premises, and

the Court having found its Findings and Fact and Conclusions of Law in this matter;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I

That plaintiff's contract between American Institute of Marketing Systems, Inc. and Don Rhoades Corporation, defendant, was void ab initio.

II

That George M. Kinder was never an agent of defendant corporation for the service of process in the State of Missouri.

III

That the judgment rendered in St. Louis County, Missouri, in Case No. S-9369 was void of no force and effect and not entitled to full faith and credit in the State of New Mexico.

IV

That plaintiff's cause of action brought on the judgment rendered under the full faith and credit act in St. Louis County, Missouri, in Case No. S-9369, is invalid and of no force and effect.

V

That plaintiff corporation's contract with defendant corporation is void and of no force and effect.

VI

That this matter is res judicata as to the plaintiff and defendant, based on the contract signed by defendant and any allied or supplemental cognovit notes and other instruments.

VII

That defendant corporation is entitled

to its costs.

VIII

Plaintiff's cause of action is hereby dismissed with prejudice, both as to the Missouri judgment and on the merits as to the validity of its contract with defendant corporation.

s/EDWIN L. SWOPE
District Court Judge

Filed June 8, 1970

APPEAL FROM THE DISTRICT COURT

OF BERNALILLO COUNTY

OPINION

TACKETT, Justice.

This action was commenced in the District Court of Bernalillo County, New Mexico, to domesticate a foreign judgment obtained by the American Institute of Marketing Systems, Inc.,

a Missouri corporation, designated "Aims," against defendant Don Rhoades Corporation, designated "Rhoades," in the Magistrate Court, Seventy District, St. Louis County, Missouri. Aims filed a motion for summary judgment, which was denied. The case was then tried without a jury and judgment was entered in favor of defendant Rhoades. Plaintiff Aims appeals.

Briefly, the facts are that Aims and Rhoades entered into a contract in February, 1967, which will be referred to as a "residential real estate referral program for Aims' member brokers." The contract contained an automatic renewal provision on the same terms and conditions. The contract also provided that Rhoades may terminate the agreement by giving Aims thirty-day-written notice of intention to terminate. Another provision, and most

important, is that:

> "...George M. Kinder, located at Route 3 Box 25, U.S. Hwy. 40, in Chesterfield, St. Louis County, Missouri, shall serve Aims as its nominee for the receipt of materials . . . and shall serve . . . (Rhoades) as Broker's Agent for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof."

This was a six-months contract. Rhoades did not technically comply with the cancellation provision of the contract. He did, however, pay for the first six months of the contract and this cause of action is for payment under the contract for a subsequent six-month period under the automatic renewal provision. Suit was filed in Missouri. Process was served on Kinder, agent for Aims and Rhoades. Kinder mailed the complaint and summons to Rhoades by registered mail, return receipt.

Upon receipt of the summons and complaint, Rhoades contacted his local attorney, who advised that it would be necessary to defend the suit in the Missouri court, which Rhoades did not do. At the end of the subsequent six-month period, default judgment was taken against Rhoades in the Missouri court and, after being properly exemplified and authenticated, the judgment was transmitted to Aims' attorney in Albuquerque, who filed this action against Rhoades.

This court observes that Aims has been involved in considerable litigation in other jurisdictions as a result of substantially the same type of contract as herein involved.

The issue in the instant case is whether the trial court was obligated to give full

faith and credit to the Missouri judgment.

Under the posture of this case, we are most reluctant to reverse. However, it becomes necessary, as the trial court committed error in failing to give full faith and credit to the judgment of the Missouri court under the United States Constitution, Art. IV, § 1, which provides in part.

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ."

(Citations omitted.)

The proper forum for litigating the issues involved in this case was the Missouri court, and the trial court should have granted summary judgment, even if its conscience may have been shocked by the contract between the parties, as is ours in the instant case.

> ". . . . (I)t is not the province of the court to alter or amend the contract, but rather to interpret and enforce the contract as made by the parties. . . ."

Hopper v. Reynolds, 81 N.M. 255, 466 P.2d 101 (1970).

The case is reversed and remanded to the trial court, with instructions to reinstate the case on the docket and enter a new judgment in favor of Aims in the amount of the Missouri judgment only. Each party will stand their own costs and no attorneys' fees will be allowed. IT IS SO ORDERED.

s/PAUL TACKETT
JUSTICE

WE CONCUR:

s/ JOHN B. McMANUS, JR. J.

S/ DONNAN STEPHENSON J.

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO
(Wednesday, June 16, 1971)

No. 9172

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation,

Plaintiff-Appellant,

vs. Bernalillo County

DON RHOADES CORPORATION, a corporation,

Defendant-Appellee.

This matter coming on for consideration by the Court upon motion of Appellee for a rehearing, and the Court having considered said motion and briefs of counsel and being sufficiently advised in the premises;

IT IS ORDERED that motion of appellee for rehearing be and the same is hereby denied.

ATTEST: A True Copy

s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, August 4, 1971

NO. 9172

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri Corporation,

Plaintiff-Appellant,

vs.

Bernalillo County

DON RHOADES CORPORATION, a Corporation,

Defendant-Appellee.

This matter coming on for consideration by the Court upon motion of Appellee for supersedeas, recall of mandate and stay of judgment, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that, pursuant to the provisions of Rule 9 of the Rules of the Supreme

Court, a cash or corporate bond in the amount of $2,500.00 be and the same is hereby fixed, said bond to be filed in the Supreme Court, approved by a Justice of the Supreme Court within ten days of the date hereof.

ATTEST: A True Copy

s/Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

DON RHOADES CORPORATION,
a corporation, Petitioner,

vs.

AMERICAN INSTITUTE OF
MARKETING SYSTEMS, INC.,
a Missouri corporation, Respondent.

APPENDICES TO

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Counsel for Respondent
SUTIN, THAYER & BROWNE
Irwin S. Moise and
Jonathan B. Sutin
800 Simms Bldg., P.O. Box 1945
Albuquerque, New Mexico 87103

NOTE

APPENDIX A

August 4, 1967

For value received, I/We promise to pay to the order of American Institute of Marketing Systems, Inc. or Bearer 6 consecutive equal monthly installments as follows, viz: $ 77.50 on the 20th day of August, 1967 and a like amount on the 20th day of each month thereafter until the entire sum is paid. If default is made in any installment when due under the terms of this note, the entire note shall become due and payable, together with reasonable attorney's fees, at the option of the payee. This note bears interest after maturity at the highest legal rate.

Where authorized, I/We authorize any attorney at law to appear in any court of record in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against Me/Us in favor of the holder thereof for the amount then appearing due, and thereupon to release all errors and waive all right of appeal.

AIMS CORPORATION

DON RHOADES, CORPORATION

X _____

APPENDIX B

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation,	)	
Plaintiff,	)	
vs.	)	No. A 38745
DON RHOADES CORPORATION, a corporation,	)	
Defendant.	)	

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: HINES & MISTRETTA
Attorneys for Defendant
2929 Monte Vista, N.E.
Albuquerque, New Mexico

PLEASE TAKE NOTICE that on August 6, 1969, at 9:00 a.m., or as soon thereafter as counsel may be heard, the plaintiff will

move the Court for judgment on the ground that there exists in this action no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

This Motion is based on the Complaint filed herein and the affidavits and documents which are attached hereto as designated:

1. Affidavit of Newton D. Baker, attached hereto as Exhibit 1.

2. Affidavit of George M. Kinder, attached hereto as Exhibit 2.

3. Exemplified copy of Summons issued in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court, St. Louis County, Mo.), attached hereto as Exhibit 3.

4. Certified copy of return of service, exemplified, in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court,

St. Louis County, Mo.), attached hereto as Exhibit 4.

5. Certified copy of the Judgment, exemplified, in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court, St. Louis County, Mo.), attached hereto as Exhibit 5.

SUTIN, THAYER & BROWNE
Attorneys for Plaintiff

By s/Jonathan B. Sutin
Jonathan B. Sutin
P. O. Box 1945
Albuquerque,
New Mexico 87103

We hereby certify that we have mailed a copy of the foregoing Pleading to opposing counsel of record this 24th day of June, 1969.

SUTIN, THAYER & BROWNE

By s/Jonathan B. Sutin
Jonathan B. Sutin

[Page 14 of Respondent's Reply refers to Exhibit "A" to the foregoing Motion for Summary Judgment. The pertinent portions of the contract, the contract being attached as Exhibit "A" to the Affidavits of Baker and Kinder which were themselves attached to the Motion for Summary Judgment, are set out below:]

CONTRACT, paragraph 5(g) [automatic renewal provision]:

> g. The initial term of this agreement shall be 36 6 DER months commencing on the date the Agreement is accepted by AIMS at its home office, 111 So. So. Bemiston Avenue, St. Louis, Missouri 63105.

[The original of the above quoted pro-

vision shows the number "36" crossed out and the number "6" inserted above with the written initials "DER" which stands for "Donald E. Rhoades," the principal of the Petitioner.]

[Page 16 of Respondent's Reply refers to the foregoing Motion for Summary Judgment (Appendix B). The attachments to the Motion are not made a part of these appendices. The attachments are, however, listed on the Motion. Number 5, the certified copy of the Judgment, states that the action was an "Action for Contract."

RESPONDENTS

REPLY BRIEF

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

DON RHOADES CORPORATION,
a corporation, Petitioner,

vs.

AMERICAN INSTITUTE OF
MARKETING SYSTEMS, INC.,
a Missouri corporation, Respondent.

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Counsel for Respondent
SUTIN, THAYER & BROWNE
Irwin S. Moise and
Jonathan B. Sutin
800 Simms Bldg., P.O. Box 1945
Albuquerque, New Mexico 87103

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

DON RHOADES CORPORATION,
a corporation, Petitioner,

vs.

AMERICAN INSTITUTE OF
MARKETING SYSTEMS, INC.,
a Missouri corporation, Respondent.

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

The Respondent requests the Court to deny the Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico on the following grounds:

A. THE NEW MEXICO SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT

The Petition does not set forth a federal question of substance not before determined by the United States Supreme Court. United States Supreme Court Rule 19(1)(a). The United States Supreme Court has considered the question of collateral attack on foreign judgments based upon fraud. See STEWART v. MAXWELL, 1 N.M. 563 (1873), aff'd, 88 U.S. (21 Wall.) 71, 89 U.S. (22 Wall.) 77, 22 L.Ed. 565 (1875); CHRISTMAS v. RUSSELL, 72 U.S. (5 Wall.) 290, 18 L.Ed. 475 (1866). Cf., UNITED STATES v. THROCKMORTON, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878); HILTON v. GUYOT, 159 U.S. 113, 40 L.Ed. 95 (1895). The United States Supreme Court has considered

the validity of service of process under a contractual provision wherein a party to the contract appoints an agent in another state as his agent for service of process. NATIONAL EQUIPMENT RENTAL, LTD. v. SZUKHENT, 375 U.S. 311, 84 Sup. Ct. 411, 11 L.Ed. 2d 354 (1964).

B. THE PETITIONER HAS NOT COMPLIED WITH SUPREME COURT RULE 23(1)(f)

The Petitioner states that it raised fraud in the inducement as a defense in its Answer and on appeal, and that it raised a cognovit note defense on appeal (Petition, pp. 11, 12). The Petitioner failed, as required by Supreme Court Rule 23(1)(f), to:

a. State the way in which the questions were passed on by the Court;

b. Quote pertinent portions of the

record;

c. Specifically refer to the place in the record where these matters appeared.

C. THE COGNOVIT NOTE QUESTION, IF A FEDERAL QUESTION, WAS UNTIMELY AND NOT PROPERLY RAISED

As can be seen by negative inference from the Petition itself, the cognovit note question was neither a part of Petitioner's Answer to the Complaint, nor raised by the Petitioner at trial (Petition, p. 12). The New Mexico Supreme Court did not mention this question in its Opinion (Petition, Appendix "B", pp. 46-51). The cognovit note question, even if a federal question clearly raised in the Petition (see Part D, infra, regarding Supreme Court Rule 23(4)), was not timely and properly raised so as to give this Court jurisdiction to review the decision of the New Mexico Supreme Court on

writ of certiorari.

D. THE PETITIONER HAS NOT COMPLIED WITH SUPREME COURT RULE 23(4)

Under Supreme Court Rule 23(4), the Petitioner must "present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration." The Petition is neither accurate, brief, nor clear.

The Petitioner "shotguns" its quest for review by stating the question as (Petition, pp. 4-5):

> [W]hether the Court of a sister state is required to give full faith and credit to the judgment of the sister state under . . . (Article 4, Section 1, U.S. Constitution) blindly and without any defense being allowed the judgment debtor of the state where full faith and credit is sought to be invoked by the judgment entered in the sister state.

A look at the Petitioner's "Reasons

for Granting Writ" (Petition, pp. 13-16) shows that the Petition seeks relief under the umbrella of "due process of law." The reasons are general, oratorical statements with no specific application to the question presented. It appears that the Petitioner is contending that the Supreme Court of New Mexico has denied the Petitioner due process of law by not permitting the Petitioner to prevail on the specific defenses of (1) fraud in the inception or "conception" of the contract, and (2) judgment on a cognovit note. But precisely what the Petitioner is contending is unclear. The question should have been more accurately, briefly, and clearly presented.

E. THE CONTRACTUAL PROVISION REGARDING THE AGENT FOR SERVICE OF PROCESS IS VALID

The Petitioner refers to and quotes

paragraph 5(f) of the Respondent's contract (Petition, pp. 8-9). The Petitioner appears to contend that this provision is unlawful and that the New Mexico Supreme Court was blind to its illegality.

The Missouri Supreme Court, sitting en banc, has decided that the precise contractual provision in issue in this case, paragraph 5(f) of the Respondent's contract, is valid. STATE OF MISSOURI EX REL AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. CLOYD, 433 S.W. 2d 559 (Mo. Sup. Ct. 1968). The court held that service of process on an agent in Missouri appointed by a citizen of Arkansas under Section 5(f) of the AIMS contract was valid and binding.

The United States Supreme Court has upheld a similar provision. NATIONAL EQUIPMENT RENTAL, LTD. v. SZUKHENT, 375 U.S. 311,

84 Sup. Ct. 411, 11 L.Ed. 2d 354 (1964).

F. THE JUDGMENT OF A SISTER STATE CANNOT BE COLLATERALLY ATTACKED BASED ON A DEFENSE OF INTRINSIC FRAUD

The Petitioner admits that its attack on the Missouri judgment was based upon the defense of fraud in the inducement to enter the contract (Petition, pp. 11-12, 15). Only one of the three cases cited by the Petitioner in support of its position denied full faith and credit to a judgment of a sister state, viz., LEVIN v. GLADSTEIN, 142 N.C. 482, 55 S.E. 371, 32 L.R.A.N.S. 905, 115 Am. St. Rep. 747 (1906). LEVIN, however, is in point against the Petitioner, for it made it clear that full faith and credit will be denied a judgment only if the fraud went to the procurement of the judgment (extrinsic fraud), and not if it

went to the inducement of a contract (intrinsic fraud). Indeed, the Petition, p. 20, states this to be the law.

A reading of the two other cases cited by the Petitioner (Petition, p. 19), MAY v. ANDERSON, 345 U.S. 528, 73 Sup. Ct. 840, 97 L.Ed. 1221 (1953), and MILWAUKEE COUNTY v. M. E. WHITE CO., 296 U.S. 268, 56 Sup. Ct. 229, 80 L.Ed. 220 (1935) shows that neither case supports the Petitioner's position.

The law is clear that in an action on a foreign judgment, fraud in the inducement, or intrinsic fraud, is not available as a defense. REIS v. TRAVELERS INDEMNITY CO., 366 S.W. 2d 11, 13 (Mo. 1963); VENEGONI v. GIUDICY, 238 S.W. 2d 17 (Mo. App. 1951); PICADURA v. HUMPHREY, 335 S.W. 2d 6 (Mo. Sup. Ct. 1960); GIBSON v. EPPS, 352 S.W. 2d 45 (Mo. App. 1961).

It is Hornbook law that valid, final and subsisting judgments of a sister state are entitled to full faith and credit under Article IV, Section 1 of the United States Constitution, when sued upon in another state. HOUSTON FIRE AND CASUALTY INS. CO. v. FALLS, 67 N.M. 189, 354 P.2d 127 (1960); MOUNTAIN STATES FIXTURES CO. v. DASKALOS, 61 N.M. 491, 303 P.2d 698 (1956); ALBRIGHT v. ALBRIGHT, 45 N.M. 302, 115 P.2d 59 (1941); EVENS v. KELLER, 35 N.M. 659, 6 P.2d 200 (1932); STEWART v. MAXWELL, 1 N.M. 563, aff'd, 88 U.S. (21 Wall.) 71, 22 L.Ed. 564, on petition for rehearing 89 U.S. (22 Wall.) 77, 22 L.Ed. 565 (1875); SCOTT v. SCOTT, 441 S.W. 2d 330 (Mo. Sup. Ct. 1969); GIBSON v. EPPS, 352 S.W. 2d 45 (Mo. App. 1961); 50 C.J.S., Judgments, §§ 888(b), 889 (1947); 47 Am. Jur. 2d, Judgments, §§ 1218, 1224

(1969).

In STEWART v. MAXWELL, 88 U.S. (21 Wall.) 71, 22 L.Ed. 564 (1875), an action of debt was commenced in the district court of New Mexico upon a judgment in one of the courts of record of Kansas. One of the defenses was that the judgment sued upon was obtained by false and fraudulent assertion of a contract, and by means of false and interested testimony. The court said, 88 U.S. at 73:

> In Christmas v. Russell, 5 Wall, 304 [72 U.S. XVIII, 479], this court held that fraud could not be pleaded to an action in one state upon a judgment in another. With this we are satisfied.
>
> Since the case of Mills v. Duryee, 7 Cranch, 481, it has been settled in this court that nil debet is not a good plea to an action upon a judgment in another state.

EL CAPITAN LAND & CATTLE CO. v. LEES,

13 N.M. 407, 86 P. 924 (1906), was a suit in New Mexico on a Kansas judgment. Defendant contended that fraud, consisting of false and perjured testimony, fraudulent concealment and collusion may be set up as a defense to the foreign judgment. The trial court did not accept this defense and rendered judgment for the plaintiff, and defendant appealed. The New Mexico Supreme Court affirmed the judgment and said, 86 Pac. at 926:

> Bearing in mind the law as declared by the authorities above cited, it is clear that the fraud alleged in the answer is not such fraud as would constitute an available defense to the judgment sued on. If Hockett's testimony was false, even to the extent of perjury, it is evident that it was concerning a matter either actually tried or which might have been tried in the action in the Kansas court. In fact, it appears that the judgment was rendered upon the testimony given by Hockett as to the correct-

ness of the account, which is alleged to have been false, and, hence, the fraud alleged related to an issue actually tried.

See Annot. 55 A.L.R. 2d 673, Fraud as Defense to Action on Judgment of Sister State, and supplements. EL CAPITAN, supra, and STEWART v. MAXWELL, supra, are cited on p. 702.

There is no defense, nor evidence of any defense that Rhoades Corporation intended to contest the Missouri claim but did not do so because of any conduct of AIMS.

G. THE MISSOURI JUDGMENT CANNOT BE COLLATERALLY ATTACKED BASED ON A DEFENSE THAT THE JUDGMENT WAS BASED ON A COGNOVIT NOTE

The Petitioner appears also to contend that it was denied due process of law because the Missouri judgment was based on a cognovit note and the New Mexico Supreme Court refused to allow the Petitioner's

defense in that regard. The Petitioner's claims are baseless:

First, the Petitioner did not raise this issue in the trial court. Further, the trial court made no Finding of Fact or Conclusion of Law that the Missouri judgment was based upon a cognovit note.

Second, the Missouri judgment was based upon the automatic renewal provision (5)(g) of the contract (Opinion of New Mexico Supreme Court, Petition, Appendix B, p. 48; see Exhibit "A" to Motion for Summary Judgment, Appendix "B", infra). The note (Appendix "A", infra) and the contract (Exhibit "A" to Motion for Summary Judgment, Appendix "B", infra) were for an original term of six months; the Petitioner paid for the first six months; the Petitioner signed no new note, but rather its

liability arose from the automatic renewal provision.

Third, even if the judgment were based on the cognovit note, it would not be invalid and would still be entitled to full faith and credit. MOUNTAIN STATES FIXTURES v. DASKALOS, 61 N.M. 491, 303 P.2d 698 (1956).

Fourth, even assuming that the law in New Mexico were not stated in MOUNTAIN STATES FIXTURES v. DASKALOS, supra, the state of forum cannot defeat a foreign judgment because it was based on a cause of action which the forum itself would not have recognized. UNION NAT'L BANK v. LAMB, 337 U.S. 38, 69 Sup. Ct. 911, 93 L.Ed. 1190 (1949).

H. THE NEW MEXICO SUPREME COURT HELD THAT THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT

At the summary judgment stage of the proceedings the Petitioner did not support its fraud defenses.

The Respondent filed a Motion for Summary Judgment (Appendix "B", infra) in the trial court. The Petitioner filed no counter-affidavit or other document to rebut the facts stated in the Respondent's Motion for Summary Judgment. The trial court denied the Respondent's Motion, although the only facts properly before the court were those contained in the Respondent's Motion for Summary Judgment.

The Respondent's first point on appeal to the New Mexico Supreme Court was as follows:

> The trial court should have sustained Plaintiff's Motion for Summary Judgment because the Missouri judgment was entitled to full faith and credit in

New Mexico as a matter of law, and because there was no genuine issue as to any material fact.

The New Mexico Supreme Court held (Petition, p. 50) that the trial court should have granted summary judgment.

The New Mexico Supreme Court had every reason to reverse the trial court. The Respondent's Motion for Summary Judgment contained uncontradicted facts sufficient to support a judgment as a matter of law. The Petitioner not only failed to raise his defenses in the Missouri trial court, he also failed to raise and support them with facts in response to the Respondent's Motion for Summary Judgment.

In New Mexico, where the facts are clear and undisputed and the only issue is the construction of documents as written, summary judgment is proper. HARRIS v. FOUR

HILLS DEVELOPMENT CORP., 79 N.M. 370, 443 P.2d 863 (1968). Where there was no issue of fact as to proper service of process on a California judgment, summary judgment was proper. SHUMATE v. HILLIS, 80 N.M. 308, 454 P.2d 965 (1969).

The validity and finality of a foreign judgment are to be tested by the law of the jurisdiction where the judgment was rendered. BAKER v. ERBERT, 199 Kan. 59, 427 P.2d 461 (1967); LIEBENDORFER v. GAYLE, 217 So. 2d 37 (La. App. 1968); LINCOLN SAFE DEPOSIT CO. v. CONTINENTAL LIFE INS. CO., 213 Mo. App. 561, 249 S.W. 677 (1923). A reading of the Missouri statutes and cases makes it clear that the Missouri judgment was valid and entitled to full faith and credit in New Mexico. See Mo. Ann. Stat. §§ 482.090 (Supp. 1970), 506.150(3) (1952), 517.050

(Supp. 1970), 517.080 (Supp. 1970), 517.100 (Supp. 1970), 517.110 (Supp. 1970), 517.770 (Supp. 1970); WILLIAMSON v. WILLIAMSON, 331 S.W. 2d 140 (Mo. App. 1960); STATE OF MISSOURI EX REL AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. CLOYD, 433 S.W. 2d 559 (Mo. Sup. Ct. 1968).

That full faith and credit is to be given to properly attested judicial proceedings is clear. U.S. Constitution, Article IV, Section 1; 28 U.S.C.A. § 1738.

C O N C L U S I O N

The higest court of the State of New Mexico has considered each issue raised herein by the Petitioner, and has properly given full faith and credit to the Missouri judgment. For the reasons stated in this Reply, the Respondent requests this Court

to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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